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Race Discrimination in EU Law after *Jyske Finans*

Case C- 668/15, Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic, Judgment of the Court (First Chamber) of 6 April 2017 EU:C:2017:278

1. Introduction

Council Directive 2000/43 of 29 June 2000 implemented the principle of equal treatment between persons irrespective of racial or ethnic origin.¹ Race Directive, as it is commonly called, was the first to take its place in the set of Equality Directives enacted under Article 19 of the TFEU which empowered the Council to take ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’² The urgency for addressing race discrimination was complemented with the comprehensiveness of its prohibition. The Race Directive thus ended up having the largest material scope of all Equality Directives, covering employment, social protection, healthcare, housing, and education.³ It also has fewer exceptions as compared to discrimination on the grounds of sex, disability, sexual orientation, religion or age.⁴ Race directive soon came to be seen as ‘more equal than others’⁵ and at the top of the ‘hierarchy of discrimination’⁶ or alternatively, the ‘hierarchy of equalities’.⁷

This primacy of the Race Directive though has not been mirrored in the docket of the ECJ. In comparison with other grounds like sex, age, or even disability, the Court has experienced far less litigation in respect of race discrimination, having received only nine cases to adjudicate on so far since 2003 when it was implemented in domestic law and became directly enforceable.⁸ The Court has found allegations of race

¹ Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

² Other Equality Directives include Employment Equality Directive (2000/78/EC) concerning discrimination on the basis of religion or belief, disability, age or sexual orientation and the Sex Recast Directive (2006/54/EC) on equal opportunities and equal treatment of women and men in employment and occupation.

³ Employment Equality Directive (2000/78/EC) is limited to the field of employment and occupation while Recast Directive (2006/54/EC) concerns only employment and occupation, though sex equality is more widely covered independently in relation to statutory social security schemes (Directive 79/7/EEC), self-employment (Directive 2010/41/EU), supply of goods and services (Directive 2004/113/EC), and in particular Directives concerning pregnancy (Directive 92/85/EEC), parental leave (Directive 2010/18/EU) and part-time work (Directive 97/81/EC).

⁴ Bell and Waddington, “More Equal Than Others: Distinguishing European Union Equality Directives”, 38 CMLR Rev. (2001), 587, 597-601.

⁵ Ibid.

⁶ Howard, “The EU Race Directive: Time for Change?”, 8 *International Journal of Discrimination and the Law*, (2007), 237.

⁷ Schiek, “A New Framework of Equal Treatment of Persons in EC Law”, 8 *European Law Journal* (2002), 290.

⁸ See for a comparison between Equality Directives based on the litigation they have generated: de Búrca, “The Decline of the EU Anti-Discrimination Law?”, Note for the Colloquium on Comparative and Global Public Law (NYU) (2016), available at http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Decline%20of%20the%20EU%20Anti-Discrimination%20Law.pdf (last accessed 3 January 2018).

discrimination to be inadmissible,⁹ inapplicable¹⁰ or unfounded¹¹ in majority of these cases. The two notable exceptions have been the landmark decisions in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*¹² and *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*¹³ where the Court found for discrimination based on ethnic origin. These cases reflected the Court's effort towards developing its jurisprudence for addressing discrimination arising out of the stereotypes and prejudices attached to immigrants and Roma in Europe.¹⁴

In contrast with these successful cases concerning discrimination on the basis of ethnic origin, the judicial approach towards racial discrimination still appears wanting. Unlike discrimination on the basis of ethnic origin in *Feryn* and *CHEZ*, the Court has not issued a substantive ruling on racial discrimination. Gráinne de Búrca argues that: 'while the tiny trickle of cases concern[ing] race discrimination being referred is a factor largely outside the control of the [ECJ], nevertheless the Court [has] not exactly embrace[d] all the opportunities which were provided to address some possibly important questions of racial and ethnic discrimination'.¹⁵ Indeed, this appears to be true in the case of its latest decision, *Jyske Finans A/S v Ligebehandlingsnævnet*,¹⁶ where the ECJ denied a finding of either direct or indirect discrimination in case of a practice requiring those born outside of the European Union or the European Free Trade Association (EFTA) to provide additional documents for identity check. In failing to appreciate, what is perhaps, a typical case of race discrimination, *Jyske Finans* subverts the strides made in *Feryn* and *CHEZ*. The reasoning and result in *Jyske Finans* begs the question of what space there is for race discrimination in the Race Directive aside of discrimination based on ethnic origin.

This note discusses the judgment in *Jyske Finans* and critically analyses it in light of the Race Directive and against the Court's more progressive equality jurisprudence. It argues that the Court's substantive approach to race or racial discrimination in *Jyske Finans* delimits the possibility of claiming race discrimination under EU law by subsuming concerns of race and racism within the construct of ethnic origin. Such an approach undermines the logic of the Race Directive, both in terms of its text and its context, which reflects an unequivocal commitment towards addressing race discrimination in Europe.

⁹ Case C-10/10, *Ministerul Justiției și Libertăților Cetățenești v Ștefan Agașitei and others*, EU:C:2011:467; Case C-328/04, *Vajnai*, EU:C:2005:596; Case C-394/11, *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and others*, EU:C:2013:48.

¹⁰ Case C-571/10, *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano and others*, EU:C:2012:233.

¹¹ Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*, EU:C:2012:217; Case C-391/09, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and others*, EU:C:2011:291.

¹² Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, EU:C:2008:397 (*Feryn*).

¹³ Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, EU:C:2015:480 (*CHEZ*).

¹⁴ Krause, "Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*", 47 CMLR Rev. (2010), 917; Atrey, "Redefining Frontiers of EU Discrimination Law", *Public Law* [2017], 185.

¹⁵ de Búrca, *supra* n8, p. 15; Möschel, "Race Discrimination and Access to the European Court of Justice: *Belov*", 50 CMLR Rev. [2013], 1433.

¹⁶ Case C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, EU:C:2017:278 (*Jyske Finans*).

2. Factual and Legal Background

Ismar Huskic and his partner purchased a second-hand car. The payment for the car was partly financed through loan by Jyske Finans, a credit institution which specialised in financing of motor vehicles. Mr Huskic and his partner provided their names, addresses, national identity numbers, and driving licenses for the purposes of their loan application. According to its internal policy rules, Jyske Finans asked Mr Huskic to provide additional proof of identity since his driving license indicated that he was born in Bosnia and Herzegovina. His partner was born in Denmark and was thus asked to provide no further proof of identity. While she was Danish by birth, Mr Huskic was Danish by naturalisation, having moved to Denmark from Bosnia and Herzegovina with his family in 1993 and assuming the Danish citizenship in 2000. Mr Huskic thought that Jyske Finans' request was discriminatory. Jyske Finans thought that it was merely discharging its obligation to prevent money laundering by imposing these additional checks. The Equal Treatment Board and the District Court, Viborg, Denmark, brought upon to consider the issue, sided with Mr Huskic. Jyske Finans appealed to the High Court of Western Denmark which then instituted the present reference proceedings before the ECJ asking, in particular, three questions. First, whether the prohibition on direct discrimination on the grounds of ethnic origin in Article 2(2)(a) of Directive 2000/43 could be interpreted to exclude a practice such as the present one where persons born outside Nordic countries, Member States of the EU, Switzerland or Liechtenstein are treated less favourably than persons in an equivalent situation born in these countries? Second, should the first question be answered in the negative, did such a practice give rise to indirect discrimination on grounds of ethnic origin under Article 2(2)(b) of Directive 2000/43, unless objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary? Third, if the second question were answered in the affirmative, could such a practice be justified as an appropriate and necessary means of safeguarding the enhanced customer due diligence measures provided in Article 13 of Directive 2005/60 on money laundering?

These questions were asked in the context of two principal Directives. In the first instance, the matter was to be considered in light of the Race Directive. Article 2(2) of the Race Directive prohibits both direct and indirect discrimination based on racial or ethnic origin. Direct discrimination is defined under Article 2(2)(a) as 'taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. Indirect discrimination is defined under Article 2(2)(b) as 'taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' The Race Directive does not define racial or ethnic origin. In the second place, the matter concerned Directive 2005/60 of the European Parliament and of the Council of 26 October 2005 which deals with the prohibition of the use of the financial system for the purposes of money laundering and terrorist financing ("Money Laundering Directive").¹⁷ Article 13 of the Money

¹⁷ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing [2005] OJ L 309/15.

Laundering Directive allows Member States to require institutions to undertake enhanced customer due diligence in situations which by their nature can present a higher risk of money laundering or terrorist financing. These situations include when a customer has not been physically present for the transaction and transactions by politically exposed persons residing in third countries.

3. Opinion of the Advocate General

Advocate General Wahl delivered his opinion on 1 December 2016.¹⁸ He began by posing an important question: ‘What does a person’s place of birth say about that person’s ethnic origin?’¹⁹ And answered it immediately with: ‘Surprisingly little’.²⁰ According to the Advocate General, ‘to hold that there is an inalienable bond between a person’s place of birth and his being of a particular ethnic origin serves, in the final analysis, only to maintain certain ill-begotten stereotypes.’²¹ This line of reasoning inspired his finding that the impugned practice in the reference proceedings did not constitute discrimination *on the basis of ethnic origin*. He thus answered the first two questions in the negative.

Advocate General’s opinion, that neither direct nor indirect discrimination existed in this case, was based on the fact that no racial or ethnic group could be determined solely on account of a person’s place of birth. In his view, ‘in order to prevent and combat racism, it is necessary to define the concept of ‘race’ itself beforehand’.²² But he considered it an inappropriate exercise to undertake in modern times, and thus substituted it ‘in favour of the less overt and tangible concept of discrimination on the basis of ethnic origin’.²³ He then applied the criteria laid down by the Court in *CHEZ* where it was held that the concept of ethnic origin had to do with ‘the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds.’²⁴ While place of birth was not listed as a marker of ethnic origin, the Advocate General agreed that it could nonetheless be a contributory factor in ascertaining ethnic origin.²⁵ Yet, place of birth *alone* cannot be determinative of ethnic origin. Place of birth should be treated as a ‘self-standing criterion of discrimination distinct from other criteria of discrimination such as ethnic origin or nationality’ and thus must not be conflated with them.²⁶ In sum, since place of birth did not conclusively determine a person’s ethnic origin and it was inappropriate to judge place of birth for the purposes of race or racial origin anyway, no direct discrimination on racial or ethnic origin could be said to have occurred when a person was differentiated based on place of birth.²⁷

Similar reasoning applied as to why the practice did not constitute indirect discrimination in the view of the Advocate General. According to him, Article 2(2)(b)

¹⁸ Case C- 668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, Opinion of Advocate General Wahl delivered on 1 December 2016, EU:C:2017:278.

¹⁹ *Ibid*, para 1.

²⁰ *Ibid*, para 2.

²¹ *Ibid*, para 3.

²² *Ibid*, para 31.

²³ *Ibid*.

²⁴ *CHEZ*, *supra* n14, para 46.

²⁵ Opinion of the Advocate General, *supra* n18, para 36.

²⁶ *Ibid*, para 39.

²⁷ *Ibid*, paras 4, 43.

of the Race Directive defined indirect discrimination as based on an apparently discriminatory measure which had the effect of placing *a particular* ethnic origin at a disadvantage. Identification of *a particular* ethnic group which was disadvantaged was as essential as identifying the ethnic group which was advantaged. So even if it were to be agreed that the practice put non-Ethnic Danes like Mr Huskic at a disadvantage in comparison to ethnic Danes, the fact that no one particular ethnic group could be identified for those affected, made it impossible to conclude that the practice fell within Article 2(2)(b). In fact, the practice could be said to affect ‘all ethnic origins in the same way, as the third countries potentially contain every ethnic origin on the face of the earth.’²⁸ The lack of specificity of an ethnic group based on a person’s place of birth was thus fatal to the finding of both direct and indirect discrimination.

Based on his position on the second question, the Advocate General did not have to consider the third question on justification. However, the Advocate General found it useful to answer it anyway, should the Court find that the practice at hand constituted indirect discrimination. He then proceeded to reflect on the third question. According to Jyske Finans, the impugned practice was instituted in compliance of the legitimate aim of preventing money laundering; and was appropriate and necessary in view of the general risk assessment based on the applicant’s place of birth (Bosnia and Herzegovina) and the lack of physical contact between Jyske Finans and the applicant when the loan was agreed.²⁹ On the other hand, the Kingdom of Denmark and the Commission argued that the practice went beyond what was necessary since the Money Laundering Directive did not establish any link between a person’s place of birth and risk of money laundering or financing of terrorism. The practice thus contributed towards the general suspicion and stigmatization of those citizens of EU/EFTA who were born outside thereof.³⁰ The Advocate General agreed with Jyske Finans that the practice may be based on a legitimate aim but ultimately found that the means of achieving that aim through the impugned practice were neither appropriate nor necessary. In the opinion of the Advocate General, the practice was inappropriate because it was not based on individualised risk assessment but simply based on general claims or undocumented risk of money laundering or terrorist financing by third-country nationals.³¹ The practice was also unnecessary in that it applied to everyone across the board who was born in a third country.³² Thus, in the opinion of the Advocate General, should the practice be determined as constituting indirect discrimination under article 2(2)(b) of the Race Directive, it could neither be considered objectively justified by the aim of preventing money laundering and the financing of terrorism, nor necessary for achieving that aim.

In sum, the Advocate General interpreted Article 2(2) of the Race Directive as not precluding the current practice, but found that, should the practice nevertheless be determined as a case of indirect discrimination by the referring Court, it could neither be objectively justified nor be considered necessary under the Money Laundering Directive.

²⁸ Ibid, para 67.

²⁹ Ibid, paras 73-74.

³⁰ Ibid, para 75.

³¹ Ibid, para 88.

³² Ibid, para 89.

4. Judgment of the Court

The ECJ delivered its judgment on 6 April 2017. In order to answer the first question as to whether the practice in question constituted direct discrimination under Article 2(2)(a) of the Race Directive, the Court embarked on ascertaining whether the practice based on a person's country of birth is to be regarded as directly or inextricably linked to his specific ethnic origin. Like the Advocate General, the Court referred here to the understanding of ethnicity articulated in *CHEZ* as connected to the idea of 'societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.³³ The Court observed that even though this understanding is open-ended and place of birth could well be a part of the criteria for determining a person's ethnicity, it could be 'only one of the specific factors which may justify the conclusion that a person is a member of an ethnic group and is not decisive in that regard'.³⁴ It thus concluded that:

Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. Moreover, it is not disputed that a country of birth cannot, in general and absolute terms, act as a substitute for all the criteria set out [above].³⁵

The Court held that it could not be presumed that place of birth determined a person's ethnicity to be able to 'establish the existence of a direct or inextricable link between those two concepts'.³⁶ In fact, Sovereign states [reflected in the place, as in, the country of birth] could not be said to have a single ethnic origin for this presumption to arise.³⁷ Thus, the practice of requiring additional documents based on place or country of birth did not, in the Court's view, constitute direct discrimination based on ethnic origin. The Court further noted that recital 13 and Article 3(3) of the Race Directive excluded the prohibition of differential treatment on the grounds of nationality in any case.

Similarly, regarding the second question on indirect discrimination, the Court took a cue from the Advocate General's opinion and stressed that the word 'particular disadvantage' in the definition under Article 2(2)(b) must be understood as meaning that it is 'particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue'.³⁸ Given that the practice applied to all persons born outside the territory of a Member State of the EU or EFTA, there was no certainty as to the practice having the effect of putting persons of a *particular* ethnic origin at a disadvantage as compared to Danes.³⁹ Thus, the Court concluded that the practice could not constitute indirect discrimination either. Since it answered both the first and the second question in the negative, the Court did not consider the need to answer the third question on the justification of indirect discrimination based on the Money Laundering Directive. It ultimately left for the referring court to make the final

³³ *Jyske Finans*, supra n16, para 17.

³⁴ *Ibid*, para 18.

³⁵ *Ibid*, para 19.

³⁶ *Ibid*, para 20.

³⁷ *Ibid*, para 21.

³⁸ *Ibid*, para 27 (citing *CHEZ*, supra n14, para 100).

³⁹ *Ibid*, paras 31, 33, 34.

assessment based on its view indicating the absence of both direct and indirect discrimination on the grounds of racial or ethnic origin.

5. Analysis

Both the Advocate General's opinion and the Court's decision in *Jyske Finans* rest on the premise of what they believe is central to the Race Directive, i.e. a determination of 'ethnicity' or 'ethnic group' for the purposes of protection from discrimination based on racial or ethnic origin. Their analysis must then examine this premise closely in relation to Article 2 which defines the 'concept of discrimination'. In the scheme of the Race Directive, it must be asked: whether the requirement in Article 2(2)(a) for direct discrimination to be based *on grounds of* racial or ethnic origin demands that a criterion like place of birth reflect *a particular* ethnic group?, and likewise, whether the prohibition on indirect discrimination in Article 2(2)(b) demands *a particular* racial or ethnic group to be put at a particular disadvantage in comparison with others?

The Court's own analysis of direct and indirect discrimination appears to be an undifferentiated and hasty exercise, characterised by two things. First, the unease with having to determine race or racism for the purposes of Article 2(2); and thus, secondly, falling back on a limited understanding of ethnicity or ethnic origin laid down in *CHEZ*. In the first instance, the Court does not consider the factual situation in light of racism or racial discrimination and focuses instead, as asked by the referring court, on whether the practice based on place of birth was ultimately based on ethnic origin. The Court is categorical from the outset that: 'For the purpose of answering [the referred] questions, it is necessary to establish whether a practice such as that at issue in the main proceedings introduces a difference in treatment based on ethnic origin within the meaning of Article 2 of Directive 2000/43.'⁴⁰ The Court does not consider the possibility of racial discrimination at all. The unease with racial discrimination is more palpable for the Advocate General who not only deems it unacceptable to define race for the purposes of the Race Directive but also readily accepts 'the less overt and tangible concept of discrimination on the basis of ethnic origin' as a good substitute for the entirety of 'discrimination based on racial or ethnic origin':

From the outset, in order to prevent and combat racism, it is necessary to define the concept of 'race' itself beforehand. However, that exercise has become increasingly unacceptable in modern societies. Accordingly, over time the prohibition against discrimination on the basis of racial origin has perhaps ceded its pre-eminence in favour of the less overt and tangible concept of discrimination on the basis of ethnic origin which...is a form of racial discrimination.⁴¹

Thus, in the second instance, both the Court and the Advocate General rely on the limited, merely indicative list of the markers of ethnic origin identified in *CHEZ* as

⁴⁰ *CHEZ*, supra n14, para 15.

⁴¹ Opinion of the Advocate General, supra n18, para 31. For a critique of this position which relies on the absence of races to argue for an absence of racism in Europe, see Möschel, "Race in Mainland European Legal Analysis: Towards a European Critical Race Theory", 34 *Ethnic and Racial Studies* [2011], 1648.

‘common nationality, religious faith, language, cultural and traditional origins and backgrounds’ and conclude that place of birth could not in and of itself be seen as a marker of ethnic origin.

Such an analysis sacrifices the form and substance of direct and indirect discrimination under Article 2(2) of the Race Directive. This is because the inquiry into, whether place of birth is determinative of ethnic groups, does not speak to the determination of either direct or indirect discrimination per se. To recall, according to Article 2(2)(a), direct discrimination is ‘taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’. The present case involved a practice based on place of birth outside the Nordic countries, and the Member States of the EU and EFTA. The practice was clearly *not* based on racial or ethnic origin on the face of it. It was a neutral one in fact. The only inquiry which had to be made was then about the effects of the neutral practice and whether it put persons of a racial or ethnic origin at a particular disadvantage compared with other persons for the purposes of Article 2(2)(b) of the Race Directive. Like direct discrimination, the Court interpreted this as indirect discrimination being contingent on the identification of *a specific* ethnic group which has been put at a particular disadvantage as compared to others.⁴²

There are several reasons to doubt this interpretation—textually, conceptually, and contextually. To recall the text of Article 2(2)(b), indirect discrimination occurs ‘where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.’ The phrase racial or ethnic origin is preceded with the indefinite article ‘a’ which, in ordinary semantics, means non-specific or any racial or ethnic origin. It is thus not the same as saying *a particular* racial or ethnic origin and especially not *a specific* racial or ethnic origin. What is clear though in Article 2(2)(b) is a requirement for ‘a particular disadvantage’ suffered by a racial or ethnic group in comparison with others who do not belong to it. Equating the particularity of disadvantage to mean the specificity of a particular racial or ethnic group requires some explanation. The Court in *Jyske Finans* cites *CHEZ* in this regard. In *CHEZ*, the Court had been asked by the referring court to reflect on the meaning of ‘particular disadvantage’ and whether it meant only ‘serious, obvious and particularly significant’ disadvantage under Article 2(2)(b) of the Race Directive. The Court had rejected this interpretation and found that in fact ‘particular disadvantage’ were to be understood as meaning that it is ‘particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue.’⁴³ The Court in *Jyske Finans* interprets this reference in light of the observation of the Attorney General that: ‘for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but *a specific concrete comparison*, in light of the favourable treatment in question.’⁴⁴ Applying this to the facts at hand, the Court concluded that it was ‘sufficient to note that that requirement [practice] is applicable without distinction to all persons born outside the territory of a Member State of the

⁴² *CHEZ*, supra n14, para 32 (‘for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question.’).

⁴³ *Ibid*, para 100.

⁴⁴ *Ibid*, para 32.

European Union or the EFTA.’⁴⁵ The fact that the practice targeted all persons born outside the territory of EU/EFTA Member States meant that there was no ‘specific concrete comparison’ to establish ‘particular disadvantage’ suffered by an ethnic group in *Jyske Finans*.⁴⁶ Comparison between persons of Danish ethnicity and all others was thus too general to be convincing. For the Court, the requirement of ‘a particular disadvantage’ would have been satisfied only with the existence of a specific concrete comparison of an ethnic group that was put at a disadvantage with another ethnic group and not with a comparison between some ethnic groups (all non-Danes) versus an ethnic group (Danes). It is debatable whether the reasoning in *CHEZ* truly supports this interpretation. *CHEZ*’s interpretation of ‘particular disadvantage’ had to do with the threshold of disadvantage suffered, not the identification of the disadvantaged groups. In fact, *CHEZ*’s interpretation of ‘persons of a given ethnic origin’ (Roma) being put at a particular disadvantage, unambiguously included the non-Roma who suffered along with the Roma, because even if they did not belong to the given ethnic group they shared the particular disadvantage accruing from the neutral practice of installing electricity meters above a certain height.⁴⁷ The non-Roma who suffered along with the Roma could have belonged to any ethnic group. The fact that several ethnic groups would have been affected by the neutral criterion did not stop the *CHEZ* Court from finding that the particular disadvantage condition under Article 2(2)(b) was satisfied in respect of identifying the disadvantaged group(s) suffering indirect discrimination.

The Court’s substantive approach to discrimination on the basis of racial and ethnic origin in *CHEZ* thus appears disadvantage not comparator-based, a view first expressed in *Feryn*.⁴⁸ The Court in *Feryn* had found statements of Directors of a firm which meant to exclude ‘immigrants’ from the recruitment process to be discriminatory towards people of a certain ethnic or racial origin.⁴⁹ In fact, one of the central takeaways from *Feryn* and *CHEZ* was the Court’s lack of doggedness over exactly those who may or may not actually belong to racial or ethnic groups suffering discrimination, but instead, focusing on the kind of disadvantages people suffered on *the basis of* racial or ethnic origins, their own or of others with whom they shared that disadvantage. Thus, in *CHEZ*, the Court had held that the policy of installing electricity meters above a certain height in a predominantly Roma district constituted direct discrimination because it was based on ‘ethnic stereotypes or prejudices’ which branded Roma as potential perpetrators of electricity theft.⁵⁰ Similarly, for indirect discrimination the Court held that: ‘[indirect] discrimination is liable to arise when a national measure, albeit formulated in neutral terms, works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing it.’⁵¹ In *Jyske Finans*, the question which must then have been asked was: were there more non-ethnic Danes and EU Citizens born outside the EU and EFTA Member States who were liable to be affected by the practice than those born in the Nordic countries, EU and EFTA Member States?

⁴⁵ *Jyske Finans*, supra n16, para 29.

⁴⁶ *Ibid*, para 32.

⁴⁷ *CHEZ*, supra n14, paras 48, 50, 60.

⁴⁸ *Atrey*, supra n15, p. 187.

⁴⁹ *Feryn*, supra n13, paras 2, 16.

⁵⁰ *CHEZ*, supra n 14, paras 82, 84.

⁵¹ *CHEZ*, supra n14, para 101.

The answer to this question reveals the ‘particular disadvantage’ suffered by non-EU and EFTA born citizens in comparison with others. The disadvantage stems from the fact that everyone who was not born in the EU or EFTA was taken to be a potential money launderer or terrorist financier and thus, was to provide additional proof of identity. The unwitting acceptance of such an assumption is the disadvantage at the heart of *Jyske Finans*. The disadvantage is particular in the sense that it affects everyone born outside of the EU or EFTA in the same way, i.e., it comprehensively brands non-EU or EFTA birth as suspect for the purposes of the money laundering legislation. Conceptually, this appears to hit right at the core of racism or racial discrimination. Take for example, Sandra Fredman’s remarks:

Racism is...not about objective characteristics, but about relationships of domination and subordination, about hatred of the ‘Other’ in defence of ‘Self’ perpetuated and apparently legitimated through images of the ‘Other’ as inferior, abhorrent, even subhuman.⁵²

Similarly, Evelyn Ellis and Phillipa Watson explain:

The concept of racism is on several occasions linked in the Preamble [of the Race Directive] with ‘xenophobia’, defined in the Shorter *Oxford English Dictionary* as a ‘morbid dread or dislike of foreigners’; this might perhaps indicate that the directive is primarily targeted at discrimination against racial groups (whatever they may be) whose origin is outside the EU.⁵³

Racism or racial discrimination, thus may not be about the definitions of racial or ethnic groups per se but about the kind of disadvantages which have come to be associated with them in the European context. According to Fredman, one such disadvantage is in being treated as the ‘Other’ and hence inferior than ‘Self’, and according to Ellis and Watson, it may indicate a dislike for foreigners or those whose origins are outside of the EU/EFTA. The impugned practice in *Jyske Finans* fits these understandings squarely, of treating those born outside of the EU/EFTA as second class, even though, they may, like Mr Huskic be citizens of Member States of the EU or EFTA.⁵⁴ Such an understanding, like Article 2(2)(b) itself, does not rest on defining the ‘Other’ but defining the particular disadvantage of being treated or affected *as* the ‘Other’. Understood conceptually, place of birth stands in for such ‘Otherisation’ as a form of racism or racial discrimination. In the current socio-political, economic and cultural terms, place of birth serves as a placeholder for Eurocentric bias, particularly towards those born in more powerful and exclusive European countries which have come to form the EU and EFTA. The assumption here being that those born outside of these countries are not Danes or Europeans belonging to the EU or EFTA, like Mr Huskic. While some ethnic Danes, and Europeans from EU and EFTA Member States too may be affected, the practice is liable to disadvantage ‘far more persons’ who are ethnically not Danish or Europeans from EU or EFTA. Again, while they may not reflect a single particular racial or ethnic group,

⁵² Fredman, “Equality: A New Generation”, 40 *Industrial Law Journal* (2001), 145, 148.

⁵³ Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP 2012), p. 34 (citations omitted).

⁵⁴ In fact, for this reason alone, that Mr Huskic was an EU citizen, there was no question of nationality as a basis of exclusion from protection under the Race Directive and thus the consideration of the relationship between ethnic origin, nationality, and place of birth in this case as pointed out in the opinion of the Advocate General. Opinion of the Advocate General, *supra* n18, para 5.

the implication of being subjected to a different policy when one was not born in these countries is a common one – of being seen and disadvantaged as the ‘Other’ and having to provide extra identification.

The European Court of Human Rights (“ECtHR”) in fact drew exactly this conclusion in *Biao v Denmark*.⁵⁵ The case involved a challenge to Danish laws on family reunification according to which a family seeking to settle in Denmark had to satisfy the “28 year rule” according to which either one of the partners should have been a Danish national for at least 28 years or, in case of non-Danish nationality, had been born and/or raised in Denmark and had lived there lawfully for 28 years. In the case of Mr Biao, neither was the case since he was Danish by naturalization for only nine years while his wife was a Ghanian national. The “28 year rule” was challenged as indirectly discriminatory on the basis of racial or ethnic origin under Article 14 on the right to equality in conjunction with Article 8 on the right to respect for private and family life of the European Convention of Human Rights. Even though the Danish government had provided no real statistics to show exactly how this rule operated in practice, the Court found that it could ‘reasonably be assumed’ that a vast majority of those affected by this rule were going to be of non-Danish or foreign ethnic origin.⁵⁶ It thus held the rule to be indirectly discriminatory on the basis of racial or ethnic origin under Article 14. The approach adopted by the Strasbourg Court is instructive for two reasons. First, the ECtHR did not deem indirect discrimination to be based on proving that those affected by the rule were of *a particular* ethnic origin understood as an identifiable cohesive ethnic group which was disadvantaged by the practice, even though the test of indirect discrimination under ECHR is similarly framed as in EU law.⁵⁷ Secondly, the Court concentrated on the disadvantage or disproportional prejudicial impact on non-ethnic Danes like Mr Biao, reflecting and reinforcing negative stereotypes about their lifestyles and integration into the Danish community.⁵⁸ This then became the substantive touchstone of discrimination based on racial or ethnic origin prohibited in Article 14 of the ECHR rather a substantive determination of the racial or ethnic groups protected by the prohibition on discrimination.⁵⁹

The ECJ in *CHEZ* and *Feryn* had shown the possibilities of developing the substantive content of discrimination under the Race Directive in this way. While neither of the cases dealt with race or race discrimination, but mainly discrimination

⁵⁵ ECtHR, *Biao v Denmark*, Appl. No. 38590/10, judgment of 24 May 2016.

⁵⁶ Ibid, para 112.

⁵⁷ According to the ECtHR: “The Court has accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against *a group*”. Ibid, para 103 (citing ECtHR, *Hugh Jordan v the United Kingdom*, Appl. No. 28883/95, judgment of 4 May 2001, para 154; ECtHR, *DH and Others v the Czech Republic*, Appl. No. 57325/00, judgment of 7 February 2006, para 184). Cf Opinion of the Advocate General, supra n18, para 65, where he observed that Article 14 ‘does not suggest that it is necessary to identify a particular ethnic origin targeted by a discriminatory measure, that is not the case for Article 2(2)(b) of Directive 2000/43.’

⁵⁸ See in particular *Biao v Denmark*, supra n55, Concurring Opinion of Judge Pinto de Albuquerque, para 13.

⁵⁹ Mathias Möschel argues that the ECtHR in *Biao* “made an important step towards challenging some of the racial underpinnings existing in numerous European (im)migration rules and their racial impact on non-White, non-Christian (im)migrants and European citizens.” in Möschel, “The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain”, 80 *Modern Law Review* (2017) 121, 122.

on the basis of ethnic origin, they both showed the Court's inclination towards using a touchstone of disadvantage understood as, inter alia, stereotypes and prejudices, for assessing discrimination given that no substantive definition of 'direct or indirect discrimination based on racial or ethnic origin' existed in the text of the Race Directive itself. *Jyske Finans* was a real opportunity for the Court to continue to develop substantive understandings of discrimination, especially race discrimination. The reasoning of the ECJ in *Biao* and the works of leading scholars in the field provided useful cues for this. In fact, the context in which the Race Directive emerged shows similar leanings of the idea of race discrimination in Europe. Article 19 of the TFEU, which was the basis of the Race Directive, was introduced after a longstanding demand from the civil society and European Parliamentarians alike 'to empower the EU to address issues of race discrimination and the rise of xenophobia in Europe.'⁶⁰ The Race Directive, adopted within just a year of Article 19 coming into force, was meant to combat the growing racial discrimination in Europe.⁶¹ The distinctions between Europeans, and Europeans and others, are the kind of distinctions that were deemed discriminatory for the purposes of the Race Directive. This is confirmed by the thoroughgoing account of race discrimination by Mark Bell, where he finds that: '[c]onsidering the policy discourse that surrounded the adoption of the [Race] Directive, there is significant evidence that ethnic discrimination was viewed as a matter predominantly affecting immigrants and their descendents'⁶² and that the 'concept of racism implies a strong nexus between racism and discourse on immigration.'⁶³ As Bell further remarks, when country of birth (or even parents' country of birth) is the only readily available data in most EU Member States (including until recently, the UK), it often becomes the criterion for racial or ethnic distinctions or identification of groups on that surrogate basis.⁶⁴ Place or country of birth thus becomes the markers of continued 'Otherisation' of even citizens of these Member States being treated as perpetual immigrants and outsiders. Whilst place of birth cannot itself determine ethnic origin or racial groups for the purposes of direct discrimination, it can be a neutral criteria which leads to indirect discrimination on the basis of race. This was the connection the Court failed to make in its reasoning on indirect discrimination.⁶⁵

Racial or ethnic origin discrimination thus has deep roots in Eurocentrism, xenophobia, and intolerance of foreigners, immigrants and outsiders. Viewed in its originating context, textual framework, and conceptual meaning, Race Directive and

⁶⁰ Craig and de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (OUP 2015) pp. 905-906; Bell, "The New Article 13 EC Treaty: A Sound Basis for European Antidiscrimination Law", 6 *Maastricht Journal of European and Comparative Law* (1999), 5.

⁶¹ Ellis and Watson, *supra* n53, p. 31.

⁶² Bell, "The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?", 78 *The Political Quarterly* (2008), 36, 37.

⁶³ Bell, *Racism and Equality in the European Union* (OUP 2009) p. 10.

⁶⁴ *Ibid.*, p.190. This is particularly well studied in the USA where discrimination on the basis of place of birth is understood as race-related stigmatisation and exclusion. Brondolo, Rahim, Grimaldi, Ashraf, Bui, and Schwartz, "Place of Birth Effects on Self-Reported Discrimination: Variations by Type of Discrimination", 49 *International Journal of Intercultural Relations* (2015), 212-222.

⁶⁵ It is useful to note that Article 21 of the EU Charter of Fundamental Rights prohibits discrimination 'on any ground' including, specifically, birth. The Charter applies to Member States when they implement Union law which includes the Money Laundering Directive. So a practice which implements the Money Laundering Directive by directly discriminating against people on the basis of their birth could potentially violate the Charter. This argument was neither made before nor considered by the ECJ.

Article 2(2) seem to have been adopted to remedy exactly the kind of situation in *Jyske Finans*. The Court's approach to addressing the situation by, first, defining ethnic origin, and then isolating a particular ethnic group as the victim of discrimination, has little to do with the substantive idea of racial discrimination. It begs the question, if not this, then what *is* racial discrimination for the purposes of the Race Directive?

According to the Advocate General and the Court, when dealing with the Race Directive, one must pour over ethnic origin as a more determinative and appropriate space to intervene, rather than race, racism and racial discrimination. They take their cue from recital 6 of the Race Directive that rejects theories which attempt to determine the existence of separate human races. But they take the rejection of different races to mean a rejection of racial discrimination as an overarching concept where people continue to face disadvantages associated with social construction and perceptions of race and racial origin; and instead, focus on discrimination based on ethnic origin which is merely, as acknowledged by the Advocate General, a form of racial discrimination.⁶⁶ With this reasoning *Jyske Finans* fortifies, what some commentators recognise as, the growing phenomenon of 'European silence on race'.⁶⁷ This is ironic given the textual, contextual and conceptual grounding of the Race Directive, spelled out above. On paper, the Race Directive remains the one with the widest material scope and with the least number of exceptions of all the Equality Directives. The way to discourage or defeat claims of racial or ethnic origin discrimination is then to just not find for it substantively, especially in indirect cases which are not explicitly based on race or ethnic origin. *Jyske Finans* seems to do just that and thus, delimits the possibility of claiming racism or racial discrimination under EU Law in a substantive sense.

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⁶⁶ Opinion of the Advocate General, *supra* n18, para 35. See in particular Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which provides that: "the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

⁶⁷ Lentin, "Europe and the Silence about Race", 11 *European Journal of Social Theory* (2008), 487; Farkas, "The Meaning of Racial or Ethnic Origin in EU Law: Between Stereotypes and Identities", European network of legal experts in gender equality and non-discrimination, European Commission (2017), 95.